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BYRON CHAPMAN,

NO. CIV. S-04-1339 LKK/DAD

Plaintiff,

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PIER 1 IMPORTS, INC., et al

## O R D E R

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Defendants.

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Plaintiff Byron Chapman ("Chapman") seeks leave to amend his complaint for disability discrimination against the defendant public accommodation, Pier 1 Imports ("Pier 1"), following a mandate from the Ninth Circuit, vacating this court's summary judgment order and instructing the court to dismiss Chapman's federal claim for lack of standing. For the reasons described below, the court instructs the parties to seek clarification from the Ninth Circuit as to whether it determined that plaintiff lacked standing based upon the allegations of his complaint or upon a factual determination.

## I. BACKGROUND

2 On July 13, 2004, Chapman, a disabled and wheelchair bound  
3 individual, brought suit against Pier 1 pursuant to the American  
4 with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA").  
5 On June 19, 2006, this court granted plaintiff's motion for summary  
6 judgment as to seven barriers listed in a report of the facilities  
7 and denied defendant's motion as to those barriers. Pier 1 appealed  
8 this decision arguing that plaintiff lacked standing as to these  
9 seven barriers because he had not personally encountered them and,  
10 consequently, they did not deter him from returning to the store.  
11 Chapman v. Pier 1 Imports (U.S.) Inc., No. 07-16326, 2011 WL 43709,  
12 at \*1 (9th Cir. 2011) (en banc). A three-judge panel of the Ninth  
13 Circuit reversed this court's grant of summary judgment and found  
14 plaintiff lacked standing as to the barriers he had not personally  
15 encountered. Id.

16 Thereafter, plaintiff petitioned for and was granted a  
17 rehearing en banc. On January 7, 2011, the en banc panel issued an  
18 opinion holding that an ADA plaintiff has standing to sue for  
19 injunctive relief as to both encountered and unencountered barriers  
20 related to his disability when that plaintiff suffers an injury-in-  
21 fact by encountering a barrier that deprives him of full and equal  
22 enjoyment of the facility due to his particular disability. Id. at  
23 \*2. However, the court found that plaintiff lacked Article III  
24 standing from the beginning of litigation because he failed to  
25 "allege and prove" the required elements for standing for an ADA  
26 claim seeking injunctive relief. Further, the court vacated this

1 court's grant of summary judgment and remanded with specific  
2 instructions to "dismiss Chapman's ADA claim for lack of  
3 jurisdiction and for further proceedings consistent with [its]  
4 opinion." Id. at \*12.<sup>1</sup>

5 On February 1, 2011, this court received a mandate from the  
6 Ninth Circuit. Shortly thereafter, on February 7, 2011, plaintiff  
7 filed a motion requesting leave to amend his initial complaint  
8 based on the Ninth Circuit's instruction of dismissal and "for  
9 further proceedings consistent with this opinion." (Pl.'s Mot. Am.  
10 2: ¶ 24.). Defendant timely opposed the motion. A hearing was held  
11 on March 14, 2011.

12 **II. STANDARD**

13 Plaintiff brings this motion under Fed. R. Civ. P. 59(e). This  
14 rule, however, only concerns motions to alter or amend a judgment.  
15 Plaintiff is not seeking to alter or amend a judgment,<sup>2</sup> but rather  
16 to file a motion for leave to file an amended complaint pursuant  
17 to the Fed. R. Civ. P. 16 scheduling order entered in this case.  
18 (Doc. No. 12). Under the scheduling order, "[N]o further . . .  
19 amendments to pleadings is permitted except with leave of court,

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20 <sup>1</sup> Given the fact that plaintiff is wheelchair bound, it would  
21 appear that the fact and the nature of the impediments, at the  
22 least, provide the basis for a conclusion or at least an inference,  
23 that there was a direct relationship between the two demonstrated  
24 facts. Moreover, because the motion for summary judgment did not  
25 assert an absence of such a relationship, plaintiff had no reason  
26 to further address the issue. In sum, since the relationship issue  
was first raised on appeal, it would appear appropriate to remand  
the matter to the district court for further factual development.

<sup>2</sup> The Ninth Circuit vacated this court's entrance of judgment  
in this case.

1 good cause having been shown." Id. at 2.

2 Plaintiff cannot show good cause to amend where amendment  
3 would be futile. Accordingly, whether plaintiff may file an amended  
4 complaint depends entirely on whether the Ninth Circuit instructed  
5 this court to dismiss plaintiff's ADA claim because plaintiff did  
6 not allege sufficient facts to demonstrate standing (the complaint  
7 is facially deficient) or whether it instructed this court to  
8 dismiss the claim because plaintiff failed to prove that he has  
9 standing to bring this case (the claim is factually deficient).<sup>3</sup>  
10 If the complaint is facially deficient, plaintiff's amendment is  
11 not futile, and leave to amend should be granted. However, if the  
12 Ninth Circuit determined that, as a matter of fact, plaintiff lacks  
13 standing, amendment would be futile, and the motion should be  
14 denied.

15 It is well established that when a claim is dismissed pursuant  
16 to Fed. R. Civ. P. 12(b)(1) that the standard applied varies  
17 according to the nature of the jurisdictional challenge. Under a  
18 facial attack to subject matter jurisdiction, the issue is whether  
19 the allegations of jurisdiction contained in the complaint are  
20 insufficient on their face to demonstrate the existence of  
21 jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039  
22 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the  
23 plaintiff is entitled to safeguards similar to those applicable

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25 <sup>3</sup> A court may also decide that a plaintiff lacks standing in  
26 the summary judgment context. It is clear that the Ninth Circuit  
did not do so here where it cites to Fed. R. Civ. P. 12(b)(1) and  
not to Fed. R. Civ. P. 56 in support of its decision.

1 when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes,  
2 23 F.3d 345, 347 (11th Cir. 1994), Osborn v. United States, 918  
3 F.2d 724, 729 n.6 (8th Cir. 1990); see also 2-12 Moore's Federal  
4 Practice - Civil § 12.30 (2009). The factual allegations of the  
5 complaint are presumed to be true, and the complaint is only  
6 dismissed if the plaintiff failed to allege an element necessary  
7 for subject matter jurisdiction. Savage v. Glendale Union High  
8 Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003),  
9 Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001).  
10 Nonetheless, district courts "may review evidence beyond the  
11 complaint without converting the motion to dismiss into a motion  
12 for summary judgment" when resolving a facial attack. Safe Air for  
13 Everyone, 373 F.3d at 1039.

14 Alternatively, under a factual attack, the "dispute [concerns]  
15 the truth of the allegations that, by themselves, would otherwise  
16 invoke federal jurisdiction." Id. Specifically, a factual challenge  
17 occurs when the court considers "affidavits or other evidence  
18 properly brought before the court." Id. Unlike in a motion to  
19 dismiss under Fed. R. Civ. P. 12(b)(6), the court need not assume  
20 the facts alleged in a complaint are true when resolving a factual  
21 attack. Id. (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir.  
22 2000)). While the motion is not converted into a motion for summary  
23 judgment, "the party opposing the motion must [nonetheless] furnish  
24 affidavits or other evidence necessary to satisfy its burden of  
25 establishing subject matter jurisdiction." Id. When deciding a  
26 factual challenge to subject matter jurisdiction, courts may only

1 rely on facts that are not intertwined with the merits of the  
2 action. Id.

3 **III. ANALYSIS**

4 Ultimately, this motion turns on an interpretation of the  
5 Ninth Circuit's January 7, 2011 decision. For reasons best known  
6 to the en banc panel, the opinion lacks clarity as to whether it  
7 found plaintiff's complaint to be facially deficient, and thereby  
8 curable, or it determined that plaintiff lacks standing based upon  
9 the evidence already tendered and produced after oral argument upon  
10 the request of the Circuit, and thereby concluded the failure is  
11 not curable. For this reason, the court instructs the parties to  
12 seek clarification from the Ninth Circuit as to basis of its  
13 finding that plaintiffs' ADA claim should be dismissed. The court  
14 discusses the ambiguity of the opinion below.

15 **A. The Text of the Opinion**

16 The en banc panel limited its review to whether plaintiff had  
17 suffered an injury-in-fact and whether he had demonstrated a  
18 likelihood of future injury sufficient to support injunctive  
19 relief. Chapman, No. 07-16326, 2011 WL 43709, at \*4 (9th Cir. Jan.  
20 7, 2011) (en banc). The previous Ninth Circuit panel concluded that  
21 plaintiff did not suffer an injury-in-fact as to unencountered  
22 barriers because the encountered barriers did not deter him from  
23 returning to the Pier 1 store. Id. at \*4. The en banc panel  
24 reversed this finding, and set forth the standard for a plaintiff  
25 to demonstrate standing to sue under the ADA. Id. Specifically, the  
26 court held that when an ADA plaintiff has suffered an injury-in-

1 fact by encountering a barrier that deprives him of full and equal  
2 enjoyment of the facility due to his particular disability, he has  
3 standing to sue for injunctive relief as to that barrier and other  
4 barriers related to his disability, even if he is not deterred from  
5 returning to the public accommodation at issue. Id. In applying  
6 their holding to this case, however, the court found that plaintiff  
7 failed to “allege and prove the required elements of Article III  
8 standing to support his claim for injunctive relief under the ADA.”  
9 Id. (emphasis added).<sup>4</sup> The court found that plaintiff’s complaint  
10 alleged that “[H]e is ‘physically disabled,’ and that he ‘visited  
11 the Store’ and ‘encountered architectural barriers that denied him  
12 full and equal access,’” but, the court explained that plaintiff  
13 “never allege[d] what those barriers were and how his disability  
14 was affected by them such that he was denied ‘full and equal’  
15 access that would satisfy the injury-in-fact requirement. . .” Id.  
16 at \*11. Furthermore, the court found plaintiff’s attachment to his  
17 complaint, referred to as the “Accessibility Survey”, listing store  
18 barriers known to him, insufficient to assert factual allegations  
19 of injury. The court concluded that plaintiff had also failed to  
20 relate the violations to his disability. Id. at \*12. The Ninth  
21 Circuit then reversed and instructed dismissal of plaintiff’s claim  
22 under Federal Rule of Civil Procedure 12(b)(1).

23 **1. Text Supporting Facial Finding**

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<sup>4</sup> Given that the standard applied was apparently the first  
26 time it was articulated by the Circuit, it would appear to be  
unremarkable that the plaintiff had not addressed the standard.

1       On the one hand, much of the opinion suggests that the Circuit  
2 found that the allegations in plaintiff's complaint were  
3 insufficient to plead standing. The court explained that plaintiff,  
4 "failed to allege and prove the elements of standing. . .", that  
5 plaintiff's "complaint itself is jurisdictionally defective[,]" and  
6 the court refers to "pleading standards" that apply to civil rights  
7 plaintiffs. Id. at \*11 (emphasis added). Further, the court cited  
8 to Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992), where the  
9 Ninth Circuit determined the district court had supplemented facts  
10 and details to plaintiff's initial complaint in a § 1983 claim. The  
11 court observed that, "Chapman's complaint fails to allege the  
12 essential elements of Article III standing." Id. at \*11 (emphasis  
13 added). Additionally, the court continued to refer to plaintiff's  
14 complaint and determined that the "Accessibility Survey" attached  
15 to his complaint, listing barriers known to him, were insufficient  
16 to connect the "alleged violations" to plaintiff's disability. Id.  
17 at \*12. In support of its dismissal, the court cites to pleading  
18 requirements as specified by Ashcroft v. Iqbal, 129 S. Ct. 1937  
19 (2009), explaining that "Chapman's allegation that the barriers at  
20 the Store 'denied him full and equal employment' is precisely the  
21 'formulaic recitation' of the elements of a claim that the Supreme  
22 Court has deemed insufficient under Rule 8," and that "[t]o  
23 sufficiently allege standing, Chapman must do more than offer  
24 'labels and conclusions' that parrot the language of the ADA." Id.  
25 at \*12, n.9.

26       Additionally, the Ninth Circuit does not expressly state that

1 plaintiff cannot establish standing in further proceedings. The  
2 court stated, "[a]lthough Chapman may establish standing as to  
3 unencountered barriers related to his disability, the list of  
4 barriers incorporated into his complaint does nothing more than  
5 'perform a wholesale audit of the defendant's premises.'" Id. A  
6 possible interpretation of this language could be that plaintiff  
7 may have satisfied standing if he had properly pled his ADA claim.

8 Moreover, in the language instructing this court to dismiss  
9 the ADA claim, the Circuit cited to United States v. Hays, 515 U.S.  
10 737, 747 (1995). In Hays, the Supreme Court vacated and remanded  
11 a redistricting gerrymandering case to the district court and  
12 ordered it to dismiss plaintiff's claim for lack of standing. Id.  
13 There, the Court remanded the case to the district court after  
14 considering evidence presented during a two-day hearing in support  
15 of plaintiffs' motion for a preliminary injunction. Nonetheless  
16 once remanded, the district court granted plaintiffs leave to amend  
17 the complaint in light of the Court's holding. Hays v. State of  
18 La., 936 F. Supp. 360, (W.D. La. 1996). Similar to the case at bar,  
19 the Court held that plaintiffs had failed to allege how they were  
20 aggrieved and how they personally suffered injury as a result of  
21 the redistricting plan adopted by the state. Hays, 515 U.S. 737,  
22 745-746 (1995). The Court found that although a plaintiff could  
23 state a claim for relief under the Equal Protection Clause by  
24 alleging that the state had adopted a reapportionment scheme that  
25 discriminated against citizens based on race, appellees lacked  
26 standing to bring this claim because they lived outside of the

1 district in dispute. Id. at 738-739. The district court interpreted  
2 the Supreme Court's instruction on remand as a directive allowing  
3 the amendment of the complaint. Specifically, the district court  
4 found that the Court had instructed it to dismiss the claim but  
5 "not their action." Hays v. State of La., 936 F. Supp. 360, 365  
6 (W.D. La. 1996) (emphasis in original). Further, the district court  
7 in Hays explained that "it is well established that a district  
8 court should grant leave to amend a complaint even after the  
9 original complaint has been dismissed so long as the action is  
10 still before the court." Id. (citing Federal Rule of Civil  
11 Procedure 15(a) providing "leave shall be freely granted when  
12 justice so requires"). Thus, the Ninth Circuit's reference to this  
13 case could be interpreted as a directive to permit leave to amend  
14 plaintiff's complaint.

15 **2. Text Supporting Factual Finding**

16 On the other hand, several sections of the opinion suggest  
17 that the Circuit made a factual determination that plaintiff's  
18 complaint should be dismissed. Specifically, the court repeatedly  
19 states that plaintiff failed to "allege and prove" the elements of  
20 standing under the ADA. Chapman, 2011 WL 43709, at \*11 (emphasis  
21 added). The court explained that plaintiff had not "alleged or  
22 proven that he personally suffered discrimination. . ." Id. at \*2  
23 (emphasis added). Further, the court points out that even if  
24 plaintiff had amended his complaint to include his expert's "Card  
25 Report" to address barriers he did encounter, he still failed to  
26 relate them to his disability. Id. at \*12, n.10. In support of this

1 proposition, the court cites to Martinez v. Longs Drug Stores, Inc., No. CIV-S-03-1843 DFL CMK, 2005 WL 2072013 (E.D. Cal. Aug. 25, 2005), in which the district court granted summary judgment for defendants because plaintiffs lacked standing. This reference supports an indication that the Ninth Circuit considered the evidence presented in this court's decision for summary judgment as well as the evidence it requested plaintiff to submit following oral argument.

9 Furthermore, the posture of this case strongly suggests that  
10 the Court of Appeals made a determination as a matter of fact that  
11 plaintiff lacked standing. Specifically, the Circuit did not  
12 consider whether plaintiff lacked standing while this case was in  
13 the pleading stage. Rather, discovery had closed and this court had  
14 entered judgment in the case. Accordingly, the Ninth Circuit  
15 considered deposition testimony in addition to the allegations of  
16 plaintiff's complaint when reaching its decision. Under these  
17 circumstances, it does appear that the court may have made a  
18 determination that plaintiff's claim should be dismissed because,  
19 based upon the complete factual record before it, he lacked  
20 standing.

21 **B. Oral Argument Before En Banc Panel**

22 The court cannot determine whether the Circuit instructed it  
23 to dismiss plaintiff's ADA claim for lack of standing such that  
24 plaintiff can cure the defect. For this reason, the court turns to  
25 the oral argument heard before the en banc panel for guidance as  
26 to how it should interpret the opinion. During oral argument, the

1 judges directed questions to counsel regarding both factual  
2 evidence proving that plaintiff had suffered a cognizable injury  
3 and pleading issues with his complaint. Recording for Case  
4 Chapman v. Pier 1 Imports, No. 07-16326 E.B.,  
5 [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000005243](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005243)  
6 (last visited Mar. 8 2011). On one hand, Judge Kleinfeld insisted  
7 that both plaintiff's counsel and defendant's counsel address the  
8 injury plaintiff had suffered during his visit to the store. Id.  
9 Judge Kleinfeld requested references to the record and evidence  
10 from depositions, making clear on numerous occasions that he was  
11 not concerned about the "allegations" but about "evidence" in the  
12 record. Id. On the other hand, Judge Berzon alluded that the issue  
13 in the case was not necessarily a standing issue but a "pleading"  
14 issue. Id. at 19:00-20:00. Judge Berzon explained that the only  
15 issue was that the complaint was not amended and it was simply a  
16 "technical problem." Id. It seems clear, then, that the panel had  
17 divergent views on whether the standing question was a factual or  
18 a facial determination. Nevertheless, their opinion failed to shed  
19 any light on the matter. Thus, oral argument does not provide much  
20 guidance on the determinative question here.

21 **C. Supplemental Briefing to the Panel**

22 Also during oral argument, Judge Kleinfeld asked plaintiff's  
23 attorney to provide specific citations to evidence in the record  
24 that illustrated how plaintiff had been "aggrieved" during his  
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1 visit to Pier 1.<sup>5</sup> Plaintiff's counsel could not cite to the record  
2 at that time and Judge Kozinski provided him an opportunity to  
3 submit that evidence to the court shortly after oral arguments. In  
4 response, counsel for plaintiff submitted deposition testimony of  
5 plaintiff and plaintiff's declaration filed in support of his  
6 motion for summary judgment. Letter from Scottlynn J. Hubbard IV,  
7 Pl.'s counsel, to Ninth Circuit Court (Mar. 24, 2010). The fact  
8 that the panel requested additional evidence suggests that they  
9 found plaintiff's claim insufficient as a factual matter but, in  
10 light of the discussion in the opinion, this request is not  
11 determinative of the question this court.

12 **D. Procedure for Seeking Clarification from the Circuit**

13 In certain circumstances, the Ninth Circuit will clarify  
14 ambiguous mandates. Where a party demonstrates good cause and that  
15 clarification will prevent injustice, the Court of Appeals may  
16 clarify its mandate. Planned Parenthood v. American Coalition of  
17 Life Activists, 518 F.3d 1013, 1022 (9th Cir. 2008) (citing  
18 Aerojet-General Corp. v. The American Arbitration Assoc., 478 F.2d  
19 248, 254 (9th Cir. 1973); Graham v. Balcor Co., 241 F.3d 1246, 1248

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21 <sup>5</sup> The parties disputed the scope of Kleinfeld's question. Plaintiff interpreted the question broadly to encompass any evidence of injury and defendant interpreted it narrowly to testimony where plaintiff said "I've had more trouble getting on toilets because it was further from the wall than it should have been." The court does not interpret what the appropriate scope of the question was. Rather, the fact that the panel requested evidence of plaintiff's injury, regardless of how broad or narrow that request was, suggests that the Circuit was considering whether the evidence demonstrated that plaintiff had standing to bring his ADA claim.

1 (9th Cir. 2001) (citing same). The Circuit has identified "where  
2 the mandate does not fully express the intentions of the court" as  
3 a classic example of when a mandate should be recalled to prevent  
4 injustice. Graham, 241 F.3d at 1248 (quoting Aerojet-General Corp.,  
5 478 F.2d at 254). In Graham, the court noted that the district  
6 court's inability to interpret the mandate as evidence that  
7 supported the issuance of a revised mandate. Id. Under these  
8 circumstances, the court finds that it is appropriate for the  
9 parties to seek clarification of the mandate issued in this case.

10 **E. Plaintiffs' Failure to Comply with Local Rules**

11 Under L.R. 137(c), plaintiff may not move to file an amended  
12 complaint without attaching a proposed complaint. Here, plaintiff  
13 failed to do so. Counsel for plaintiff is hereby ordered to show  
14 cause in writing why sanctions should not issue in accordance with  
15 L.R. 110, including a fine of \$150 and/or dismissal of this case,  
16 for their failure to attach a proposed amended complaint to the  
17 motion. See also Fed. R. Civ. P. 41(b), Link v. Wabash R.R., 370  
18 U.S. 626, 633 (1962). Counsel shall file a response to this order  
19 to show cause and shall file a proposed amended complaint within  
20 seven days of the issuance of this order.

21 **IV. CONCLUSION**

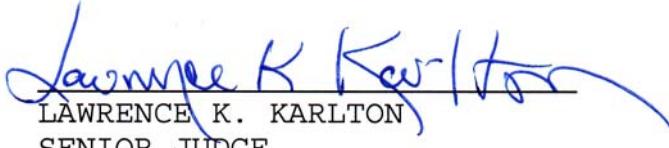
22 For the foregoing reasons, the court DECLINES to decide this  
23 matter pending the parties' request for clarification to the Ninth  
24 Circuit. Accordingly, plaintiff's motion to file an amended  
25 complaint (Doc. No. 142) is DENIED WITHOUT PREJUDICE. Plaintiff  
26 shall re-file his motion following either clarification from the

1 Ninth Circuit or notification that the Ninth Circuit will not  
2 clarify the mandate.

3 The court FURTHER ORDERS counsel for plaintiff to show cause  
4 for their failure to attach a proposed amended complaint to their  
5 motion. Counsel's response and the proposed amended complaint SHALL  
6 BE FILED within seven (7) days fo the issuance of this order.

7 IT IS SO ORDERED.

8 DATED: March 17, 2011.

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11 LAWRENCE K. KARLTON  
12 SENIOR JUDGE  
13 UNITED STATES DISTRICT COURT  
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